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Company. Judgment for plaintiff, and defendants brings error. Affirmed.

Peatross & Savage, of Norfolk, for plaintiff in error.

J. Winston Read, of Newport News, for defendant in error.

ABERNATHY *v.* EMPORIA MFG. CO.

March 21, 1918.

[95 S. E. 418.]

1. Appeal and Error (§ 694 (1)*)—Review—Certification of Evidence.—Where the evidence and not the facts are certified, the case stands in the appellate court as on a demurrer to the evidence by the plaintiff in error.

[Ed. Note.—For other cases, see 1 Va.-W. Va. Enc. Dig. 577.]

2. Railroads (§ 485 (3)*)—Action for Setting Fire—Instructions.—In action for damages against an operator of a railroad for setting fire, an instruction that the burden was on plaintiff to show by a preponderance of evidence "how and why the fire occurred" and that the final burden was upon him to prove by a preponderance of the evidence that the origin of the fire was due to defendant's negligence, was not erroneous as requiring plaintiff to prove his case beyond a reasonable doubt.

[Ed. Note.—For other cases, see 6 Va.-W. Va. Enc. Dig. 138.]

3. Trial (§ 228 (3)*)—Instructions—Propriety.—The mere fact that certain language has been used by the judge of an appellate court in rendering an opinion is not of itself sufficient to justify the use of the same language by a trial court in an instruction to the jury.

[Ed. Note.—For other cases, see 7 Va.-W. Va. Enc. Dig. 714.]

4. Railroads (§ 485 (6)*)—Action for Setting Fires—Instruction.—In an action for damages, for setting fire, against an operator of a railroad, an instruction that even if the jury believed that the fire originated on a right of way by the emission of sparks, yet if such right of way was reasonably clear of combustible material, defendant was not liable, was erroneous as not including the necessary element that defendant's locomotive must have been equipped with the best appliances in known practical use, in good order, and carefully operated.

[Ed. Note.—For other cases, see 6 Va.-W. Va. Enc. Dig. 138.]

5. Railroads (§ 485 (1)*)—Action for Setting Fires—Instructions.—In an action for setting fire to plaintiff's property by sparks from defendant's locomotive, an instruction that the burden of showing negligence was on plaintiff by preponderance of the evidence and that if the fire might have been started from one of two causes, for one of which

*For other cases, see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes,

defendant was responsible plaintiff could not recover, nor could he recover if it was just as probable that the fire was caused by one as the other, and if the fire might have been set out by boys smoking cigarettes, they should find for defendant, was not erroneous as containing unrelated and contradictory propositions.

[Ed. Note.—For other cases, see 6 Va.-W. Va. Enc. Dig. 138.]

6. Trial (§ 242*)—Instructions—Propositions of Law.—Two or more correct propositions of law may be stated in the same instruction if the jury will not be confused thereby.

[Ed. Notes.—For other cases, see 7 Va.-W. Va. Enc. Dig. 727.]

7. Trial (§ 252 (9)*)—Actions for Setting Fires—Instructions.—In an action for fire alleged to have been set out by sparks from defendant's locomotive, an instruction that defendant would not be liable if the fire was set out by boys supposed to have passed along the right of way smoking cigarettes, was not erroneous as not being based on the evidence.

[Ed. Note.—For other cases, see 6 Va.-W. Va. Enc. Dig. 138; 7 Va.-W. Va. Enc. Dig. 718.]

8. Railroads (§ 485 (1)*)—Action for Setting Fires—Instruction.—In an action for damages from a fire set by defendant's locomotive, an instruction that, unless the jury believed that a certain engine might have caused the fire, they should not consider evidence relative to fires set out by that engine, nor evidence relative to other fires, unless they believed that that engine might have caused them, was not erroneous as combining two distinct charges with reference to two severable questions.

[Ed. Note.—For other cases, see 6 Va.-W. Va. Enc. Dig. 138.]

9. Railroads (§ 485 (1)*)—Action for Setting Fires—Instructions.—In an action for fire set by defendant's locomotive, an instruction that in order to warrant a verdict against defendant the evidence must show more than a probability of a negligent act, since an inference cannot be drawn from a presumption, was not misleading.

[Ed. Note.—For other cases, see 6 Va.-W. Va. Enc. Dig. 138.]

10. Trial (§ 260 (7)*)—Action for Setting Fires—Instructions.—In an action for damages from a fire set by defendant's locomotive, the refusal of an instruction for plaintiff that if the jury believed that the fire which caused the damage originated from sparks emitted by one of defendant's engines, defendant was presumptively guilty of negligence, and that the jury were not to condemn a spark-arresting device merely because other persons preferred a different pattern, and that the burden was on defendant to prove that its engine was equipped with the best mechanical device in practical use, kept in good repair, and operated properly, was not error, where the court had in other instructions charged the jury that if they believed

*For other cases, see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.

from the evidence that the fire originated from sparks emitted by one of the engines of defendant, defendant was presumptively guilty of negligence, and that if defendant's engine was equipped with as good a spark arrester as was known in practical use, in good repair, and skillfully operated, and the right of way was reasonably clear of combustible material, they should find for defendant.

[Ed. Note.—For other cases, see 6 Va.-W. Va. Enc. Dig. 138; 7 Va.-W. Va. Enc. Dig. 742.]

11. Railroads (§ 481 (5)*)—Action for Setting Fires—Evidence.—

In action for damages from a fire set by defendant's locomotive, evidence that defendant's right of way was not clear of combustible material a mile away from where the fire occurred was properly excluded as immaterial.

[Ed. Note.—For other cases, see 6 Va.-W. Va. Enc. Dig. 134.]

12. Railroads (§ 481 (4)*)—Action for Setting Fires—Evidence.—

In an action for damages for a fire set by defendant's locomotive, it was error to exclude testimony that the locomotive alleged to have caused the fire had subsequently caused several other fires; such evidence tending to show the locomotive's bad condition.

[Ed. Note.—For other cases, see 6 Va.-W. Va. Enc. Dig. 134.]

13. Witnesses (§ 395*)—Corroboration—Consistent Statements.—

In an action for damages for fire caused by defendant's locomotive, evidence that a witness had made a consistent statement was improperly received, where there was no evidence as to whether such statement was made before or after an offer by the witness to sell his testimony, nor whether it was before or after the contradictory statement.

[Ed. Note.—For other cases, see 13 Va.-W. Va. Enc. Dig. 972.]

14. Appeal and Error (§ 1048 (3)*)—Review—Harmless Error.—

In an action for a fire caused by defendant's locomotive, admission of a statement by defendant's engineer that he was careful in the operation of his engine, although in answer to a leading question, held harmless error.

[Ed. Note.—For other cases, see 13 Va.-W. Va. Enc. Dig. 954.]

15. Appeal and Error (§ 1048 (6)*)—Reception of Evidence—Conduct of Counsel.—In an action for damages by a fire set by defendant's locomotive, statement by defendant's counsel to a witness on cross-examination that he knew the situation, and others knew it, and he wanted to see whether the opinion of the witness coincided, was not prejudicial.

[Ed. Note.—For other cases, see 13 Va.-W. Va. Enc. Dig. 954.]

16. Trial (§ 28 (1)*)—Action for Setting Fires—View of Premises.—

—In an action for damages by a fire set by defendant's locomotive, it was not error to refuse to order a view of the premises, there be-

*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.

ing no controversies as to the location of the road or the general conditions, nor necessity for a view in order to make testimony intelligible, it appearing that the trial would have been delayed, and that plaintiff had not made any provision to transport the jury to the scene of the fire.

[Ed. Note.—For other cases, see 9 Va.-W. Va. Enc. Dig. 66.]

(Additional Syllabus by Editor.)

17. Appeal and Error (§ 843 (1)*)—Question Not Reviewed—Reversal on Other Grounds.—Where a case is reversed on other grounds it is unnecessary to consider whether the court should consider an objection raised for the first time on appeal when the question will not probably arise on another trial.

[Ed. Note.—For other cases, see 1 Va.-W. Va. Enc. Dig. 538.]

Error to Circuit Court, Luenburg County.

Action by C. P. Abernathy against the Emporia Manufacturing Company. Judgment for defendant, and plaintiff brings error. Reversed.

Buford & Peterson, of Lawrenceville, for plaintiff in error.
Irby Turnbull, of Boydton, and *Hiram Wall*, of South Hill, for defendant in error.

*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.